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IN THE

# Supreme Court of the United States

**October Term, 1976**

**No. 76-1226**

DANIEL SICILIANO, VICTOR ECHAVARRY, JR., and DANIEL GIBSON,

*Appellants,*

*v.*

THE STATE OF NEW YORK,

*Appellee.*

**On Appeal from the Court of Appeals of the State of New York**

## MOTION TO DISMISS OR AFFIRM

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**On Appeal from the Court of Appeals of the State of New York**

## MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16(1)(b) of the Rules of the Supreme Court of the United States, moves this Court to dismiss the appeal or, in the alternative, to affirm the order and final judgment of the Court of Appeals of the State of New York on the grounds that the decision was clearly correct and that the federal questions sought to be reviewed are so unsubstantial as not to need further argument.

## Opinions Below

The *per curiam* decision of the Court of Appeals of the State of New York is reported at 40 N.Y.2d 996, 391 N.Y.S. 2d 106, 359 N.E.2d 700. The order and opinions of the Appellate Division, First Department, affirming the judgments of conviction of appellants in Supreme Court, Bronx County, are reported at 52 App.Div.2d 408, 384 N.Y.S.2d 994.

## Jurisdiction

The order and final judgment of the Court of Appeals of the State of New York was entered on December 16, 1976. Appellants filed a notice of appeal in the Court of Appeals on February 18, 1977. The jurisdictional statement to this Court was filed by appellants on March 4, 1977. The appellants have invoked the jurisdiction of this Court pursuant to 28 U.S.C. §1257(2).

## Questions Presented

1. Whether appellants' voluntary and intelligent pleas of guilty to the crime of Obstructing Governmental Administration, entered on the advice of competent counsel, foreclose inquiry into their claims that the grand jury which indicted them was unconstitutionally selected.

2. Whether New York Judiciary Law §598, which disqualifies from grand jury service all public officers and employees of the federal, state and municipal governments who receive annual compensation in excess of one thousand



dollars, is repugnant to the Constitution of the United States under the Due Process and Equal Protection clauses of the Fourteenth Amendment.

3. Whether New York Penal Law §§145.20, 195.05, which define the crimes of Criminal Tampering in the First Degree and Obstructing Governmental Administration, are repugnant to the Constitution of the United States under Article VI, Clause 2, as applied to appellants, because the application of the penal statutes to appellants is preempted by federal statute, 33 U.S.C. §499.

## Statement of the Case

On June 7, 1971, the City of New York was afflicted with a case of labor difficulties in the form of a strike by Local 237 of the International Brotherhood of Teamsters. Daniel Siciliano, Victor Echavarry, Jr., and Daniel Gibson were members of this striking union and were employed by the City as bridge tenders. Each of these three individuals was responsible for the opening and closing of a drawbridge in Bronx County: Siciliano, the Unionport Bridge; Echavarry, the Pelham Bridge; and Gibson, the Hutchinson River Parkway Bridge. Each of the bridges involved was a link in a major artery for vehicular traffic entering and leaving New York City, and each carried this traffic over a navigable body of water.

On the morning of June 7, 1971, in furtherance of a plan conceived by the union to enhance its strike by maximizing disruption, each appellant opened his bridge so that no vehicles could traverse the span. Each appellant then re-

moved certain electrical equipment so that the bridge could not be closed and then each proceeded to walk off his job, allowing chaos to reign on the banks of the waterway.

After a thorough investigation, the Grand Jury of Bronx County returned separate three-count indictments on July 27, 1971, charging appellants with Criminal Tampering in the First Degree, Obstructing Governmental Administration, and Official Misconduct.

On August 31, 1971, appellants moved in Supreme Court, Bronx County, for orders directing the inspection of the grand jury minutes and dismissing the indictments. They claimed that a bridge is not a "public utility" within the meaning of New York Penal Law §145.20, and that the acts of which they were accused did not constitute the crime of Tampering. They attacked the second count of the indictment on the grounds that it was predicated on the first count. Finally, the last count charging Official Misconduct was alleged to be devoid of the requisite specificity. The People opposed all of these propositions. On April 3, 1972, Justice Vincent A. Massi partially granted the motions, ordering that the first and third counts of each indictment be dismissed [77 Misc.2d 49, 354 N.Y.S.2d 273 (Sup. Ct. Bronx Co. 1972)]. On June 16, 1972, the third count of each indictment, charging appellants with Official Misconduct, was resubmitted to the Grand Jury of Bronx County, which returned separate two-count indictments, charging appellants with Official Misconduct.

The People appealed from the orders of Justice Massi to the Appellate Division, First Department. On November 30, 1972, the Appellate Division modified the orders by re-



instating the first count of each indictment, charging appellants with Criminal Tampering in the First Degree [40 App.Div.2d 818, 338 N.Y.S.2d 478 (1st Dept. 1972)]. Appellants were granted leave to appeal from the orders of the Appellate Division to the Court of Appeals of the State of New York on January 19, 1973. On March 20, 1974, the Court of Appeals affirmed the orders on the memorandum at the Appellate Division [34 N.Y.2d 575, 354 N.Y.S.2d 945, 310 N.E.2d 542 (1974)].

On May 25, 1974, appellants moved in Supreme Court, Bronx County, for orders dismissing the indictments on the grounds that the grand jury proceeding was defective. They alleged that the grand jury which returned the indictments was illegally constituted in that New York Judiciary Law §598, which disqualifies from grand jury service all public officers and employees of the federal, state and municipal governments who receive annual compensation in excess of one thousand dollars, is unconstitutional. In addition, in a supplemental affirmation of July 9, 1974, they claimed that the grand jury pool had been selected as a result of purposeful discrimination against women. The People opposed these motions in all respects. On October 7, 1974, Justice Herbert B. Evans denied the motions [79 Misc. 2d 509, 360 N.Y.S.2d 559 (Sup. Ct. Bronx Co. 1974)].

On November 4, 1974, appellants petitioned the Appellate Division, First Department, for a judgment pursuant to Article 78 of the New York Civil Practice Law and Rules in the nature of a writ of prohibition, seeking the following relief: (1) that the Justices of the Supreme Court, Bronx County, and the District Attorney of Bronx County be prohibited from exercising any jurisdiction over appellants;

(2) that the indictments be dismissed; and (3) that New York Judiciary Law §598 be declared unconstitutional. Appellants raised the same claims as they had alleged in their motions before Justice Evans. The petition was consolidated with a similar petition against public officials of New York County, which presented the same legal issues. The District Attorney of Bronx County moved to dismiss the petition on the grounds that the writ of prohibition would not lie and was therefore an inappropriate remedy. On December 3, 1974, the Appellate Division denied the application for a writ of prohibition and granted the motion to dismiss the petition [46 App.Div.2d 858 (1st Dept. 1974)]. Appellants filed a notice of appeal to the Court of Appeals of the State of New York as of right on December 5, 1974, and also sought leave to appeal to the Court of Appeals. The Attorney General of the State of New York and the District Attorney of Bronx County moved to dismiss the appeals taken as of right and opposed the application for leave to appeal. The Court of Appeals of the State of New York denied the application by appellants for leave to appeal on the grounds that the remedy sought under Article 78 was unavailable; the court also granted the motions to dismiss the appeals taken as of right by appellants on the grounds that no constitutional question was directly involved [35 N.Y.2d 990, 993, 365 N.Y.S.2d 533, 324 N.E.2d 889 (1975)].

On February 11, 1975, appellants moved in Supreme Court, Bronx County, to reargue their motions previously denied by Justice Evans on October 7, 1974. The motions were reargued, and the People opposed the appellants' contentions in all respects. On July 28, 1975, Justice Evans



denied the motions. A supplemental motion to dismiss the indictments in furtherance of justice was also made by appellants. However, this additional motion was rendered moot by appellants' pleas of guilty before Justice William J. Drohan on September 18, 1975, to the crime of Obstructing Governmental Administration, in full satisfaction of all charges pending against them.

On February 27, 1976, appellants were each sentenced to a period of probation of three years and a fine of one thousand dollars. The period of probation was imposed upon the condition that during the probationary period appellants accept no promotions from their present positions.

On June 10, 1976, the judgments of conviction were affirmed by the Appellate Division, First Department [52 App.Div.2d 408, 384 N.Y.S.2d 994 (1st Dept. 1976)], in an opinion by Birns, J. Three other opinions were also filed: Markewich and Capozzoli, JJ., concurring in part and dissenting in part; Lupiano, J., concurring in part and dissenting in part; and Kupferman, J., concurring in part and dissenting in part. Leave to appeal to the Court of Appeals of the State of New York was granted by Kupferman, J., on June 14, 1976.

On appeal to the Court of Appeals of the State of New York, appellants asserted that their constitutional rights were violated because the grand jury which returned the indictments against them was illegally constituted. They claimed that (1) New York Judiciary Law §598, which disqualifies public officers and employees of the federal, state and municipal governments receiving annual compensation in excess of one thousand dollars from serving on a grand

jury, is unconstitutional; and (2) there was a systematic and intentional discrimination against women in the selection of the jury pool from which the grand jury was impaneled. Appellants also alleged that the indictments were invalid on the grounds that their actions complied with federal law, which preempts state jurisdiction under the Supremacy Clause of the Constitution. They therefore requested that the judgments be reversed and the indictments dismissed. In addition, appellants maintained that the sentences imposed were invalid, and requested that they be set aside. The People contended that (1) appellants' voluntary and intelligent pleas of guilty to the crime of Obstructing Governmental Administration, entered on the advice of competent counsel, foreclosed inquiry into their claims that the grand jury which indicted them was unconstitutionally selected; (2) New York Judiciary Law §598 is constitutional; (3) the grand jury was selected from a fair cross-section of the community, without any systematic and purposeful exclusion of women; (4) New York Penal Law §§145.20, 195.05 are constitutional as applied to appellants, unaffected by the Supremacy Clause of the Constitution of the United States; and (5) the sentences imposed were legally authorized and the conditions of probation were properly imposed. In sum, the People submitted that the judgments should be affirmed. On December 16, 1976, the Court of Appeals of the State of New York affirmed the order of the Appellate Division, First Department, in a *per curiam* decision [40 N.Y.2d 996, 391 N.Y.S.2d 106, 359 N.E.2d 700 (1976)]. On February 15, 1977, the court denied appellants' motion to amend the remittitur or for reconsideration of the appeal.



## ARGUMENT

### I.

**Appellants' voluntary and intelligent pleas of guilty to the crime of Obstructing Governmental Administration, entered on the advice of competent counsel, foreclose inquiry into their claims that the grand jury which indicted them was unconstitutionally selected.**

The Court of Appeals of the State of New York was clearly correct in its decision that appellants' voluntary and intelligent pleas of guilty to one of the lesser included counts of the indictments foreclosed further inquiry into their claims concerning the selection processes of the grand jury which indicted them. The pleas of guilty were entered on the advice of counsel, and appellants admitted to the court that they were guilty of the acts charged in the indictments. The voluntary and intelligent character of the pleas of guilty has never been challenged in the state courts, nor is it challenged in this appeal.

This Court has recognized that a plea of guilty is a grave act, for it rests on the accused's admission in open court that he committed the acts charged in the indictment. Such an admission, which an accused cannot be compelled to make, must be the voluntary expression of his own choice [*Brady* v. *United States*, 397 U.S. 742, 748 (1970); *Machibroda* v. *United States*, 368 U.S. 487, 493 (1962); *Kercheval* v. *United States*, 274 U.S. 220, 223 (1927)]. In addition, this Court has noted that a plea of guilty carries with it profound consequences, for its constitutes the accused's consent that a judgment of conviction may be entered with-

out a trial. Thus, waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences [*Brady* v. *United States, supra,* at 748; *Boykin* v. *Alabama,* 395 U.S. 238, 242-244 (1969); *McCarthy* v. *United States,* 394 U.S. 459, 466 (1969)].

In light of the weight and significance attached to a plea of guilty, this Court has refused to address the merits of a variety of alleged deprivations of constitutional rights that preceded the accused's decision to plead guilty: a claim that a burden created by statute placed on the exercise of Fifth and Sixth Amendment rights at the peril of a possible death penalty motivated the decision to plead guilty [*Brady* v. *United States, supra; Parker* v. *North Carolina,* 397 U.S. 790 (1970)]; a claim that a coerced confession obtained by the State which, at the time, could not be tested except by proceeding to trial, motivated the decision to plead guilty [*McMann* v. *Richardson,* 397 U.S. 759 (1970)]; and a claim that a racial group was systematically excluded from service on the grand jury [*Tollett* v. *Henderson,* 411 U.S. 258 (1973)].

In *Tollett,* this Court reaffirmed the principle recognized in the *Brady* trilogy, that

> a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offenses with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the



> advice he received from counsel was not within the standards set forth in McMann [*Tollett* v. *Henderson, supra,* at 267]

and thus outside

> the range of competence demanded of attorneys in criminal cases [*Tollett* v. *Henderson, supra,* at 266, citing *McMann* v. *Richardson, supra,* at 771].

Moreover, in *Tollett,* factors existed in favor of the accused not present in the case at bar: (1) the State had conceded and the lower court had found, unlike here, that there in fact had been systematic exclusion of an identifiable group in the selection of the grand jury; and (2) the facts giving rise to the constitutional claims were unknown to both the accused and his attorney prior to the entry of the plea of guilty, unlike here [*Tollett* v. *Henderson, supra,* at 259-260, 266]. Despite these circumstances, this Court held that the plea of guilty foreclosed inquiry into the merits of the claimed antecedent constitutional violation, *i.e.,* the claim of discrimination in the selection of the grand jury [*Tollett* v. *Henderson, supra,* at 266]. Certainly, where an accused and his counsel are fully aware of a possible challenge to the composition of the grand jury and deliberately enter a plea of guilty to lesser charges, such action must be construed as a knowing waiver. It is noteworthy that the dissenters in *Tollett,* concerned with the fact that the accused and his attorney were not cognizant of the constitutional violations prior to the entry of the plea of guilty, commented that "guilty pleas, because they operate as a waiver of constitutional rights, 'must be knowing, intelligent acts done with *sufficient awareness of the relevant circumstances* and likely consequences' " [*Tollett* v. *Hender-*

*son, supra,* at 272 (Marshall, Douglas, Brennan, JJ., dissenting) (emphasis in original)]. The case at bar, unlike *Tollett,* meets even these more stringent standards, for it was clear that under New York law, any claims of antecedent constitutional violations other than those involving motions to suppress evidence under Article 710 of the New York Criminal Procedure Law and claims directed toward the sufficiency of the accusatory instrument on its face would be waived [see New York Criminal Procedure Law §710.70 (2); *Lefkowitz* v. *Newsome,* 420 U.S. 283 (1975); *People* v. *Harper,* 37 N.Y.2d 96, 99, 371 N.Y.S.2d 467, 332 N.E.2d 336 (1975); *People* v. *Nicholson,* 11 N.Y.2d 1067, 230 N.Y.S.2d 220, 184 N.E.2d 190 (1962); *People* v. *Scott,* 3 N.Y.2d 148, 152-153, 164 N.Y.S.2d 707, 143 N.E.2d 901 (1957)]. Indeed, this Court has remarked that once an accused pleads guilty and therefore fails to preserve his constitutional claims for appellate review "in order to take the benefits, if any, of a plea of guilty, the State acquires a legitimate expectation of finality in the conviction thereby obtained" [*Lefkowitz* v. *Newsome, supra,* at 289].

It is clear that there is a fundamental distinction between "antecedent constitutional violations," *i.e.,* deprivations of constitutional rights that occurred prior to the entry of the guilty plea, and constitutional violations which concern "the very power of the State to bring the defendant into court to answer the charge brought against him" [*Blackledge* v. *Perry,* 417 U.S. 21, 30 (1974)]. This Court has stated that "even a tainted indictment of the sort alleged in *Tollett* could have been 'cured' through a new indictment by a properly selected grand jury" [*Blackledge* v. *Perry, supra,* at 30]. Thus, claims grounded on the "right



not to be haled into court at all" [*Blackledge* v. *Perry, supra,* at 30] carry weightier consequences than claims concerning the composition of the grand jury, which involve inherently curable defects.

Thus, the rationale of the *Brady* trilogy and *Tollett* is that

> a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established [*Menna* v. *New York,* 423 U.S. 61, 62 n2 (1975) (emphasis in original)].

The claim presented here attacking the selection of the grand jury, identical in form to the claim presented in *Tollett,* is therefore rendered irrelevant by the voluntary and intelligent pleas of guilty by appellants, entered with the advice of competent counsel, for the claimed violation is not logically inconsistent with the fact of appellants' guilt.

## II.

### New York Judiciary Law §598 is constitutional.

The Court of Appeals of the State of New York was clearly correct in its decision that New York Judiciary Law §598, which disqualifies from grand jury service all public officers and employees of the federal, state and municipal governments who receive annual compensation in excess of

one thousand dollars, does not violate the Due Process or Equal Protection clauses of the Fourteenth Amendment.

The statute [added L. 1940, c. 202 §1; amended L. 1942, c. 799 §5; L. 1943, c. 147 §1; L. 1951, c. 769 §1; L. 1953, c. 541 §1] was enacted as part of a total revision of the law regarding the administration of the jury system in the City of New York as recommended by the Judicial Council of the State of New York [see Law of New York, 163d session, L. 1940, c. 202 §1, p. 769].* After several years of effort and study, the culmination of exhaustive research into the administration of the jury system, the Judicial Council presented a proposal for a new Article 17 of the New York Judiciary Law, designed to create and govern a unified jury system in the City of New York. The recommendations proposed that the new statutes be supplemented with rules to be promulgated by the Appellate Divisions [see Sixth Annual Report of the Judicial Council of the State of New York, 1940, pp. 41-44, 195-198]. New York Judiciary Law §598 as enacted adopted the proposed draft prepared by the Council verbatim. The comment accompanying the proposed draft of the statute reveals its purpose and intent:

> [t]he last paragraph was recommended by the Grand Jury Association of New York County, on the ground that, although it is the practice not to place such persons on grand juries, specific provision to that effect should be included in the law because of the quasi-judicial, quasi-prosecuting character of grand juries when investigating official corruption [Sixth Annual Report of the Judicial Council of the State of New York, 1940, pp. 207-208].

* The Judicial Council of the State of New York was created and governed by New York Judiciary Law §§40-48 [added L. 1934, c. 128 §1; amended L. 1936, c. 231; L. 1939, c. 7; L. 1941, c. 9; L. 1942, c. 241]; the Council was "under the duty of continuous study of the procedures of the courts and making recommendations for improvement to the Legislature" [*Fay* v. *New York*, 332 U.S. 261, 278 (1947)]. These statutes were repealed, effective April 1, 1955 [L. 1955, c. 869 §2], and the Council was succeeded by the present Judicial Conference of the State of New York [New York Judiciary Law §§210-239].



It seems clear that the New York Legislature, in enacting this provision, sought to further the purposes of the New York State Constitution, Article I §6, which emphasizes the power of grand juries to inquire into the wilful misconduct of public officers. In addition, New York Criminal Procedure Law §§190.05, 190.55(1), 190.85(1) govern the functions of grand juries to hear and examine evidence concerning misconduct, nonfeasance and neglect in public office by public servants. Thus, in light of the explicit duty of the grand jury to investigate the misconduct of public officers and other public servants, it is obvious that the purpose and intent of New York Judiciary Law §598 is to reinforce state policy that the grand jury be an independent institution by removing all influences and appearances of influence by government from its membership.

That the grand jury as an institution has historically been an independent body with quasi-judicial and investigatory functions cannot be disputed. This Court has recognized the traditional wide latitude accorded the grand jury to inquire into violations of criminal law, to deliberate in secret, to determine alone the course of its inquiry, and to proceed in its investigation generally unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials [*United States* v. *Calandra*, 414 U.S. 338, 343 (1974)]. The investigatory powers of

the grand jury are not narrowly limited [*Blair* v. *United States,* 250 U.S. 273, 282 (1919)], and must be broad if its public responsibility to insure fair and effective law enforcement is adequately to be discharged [*United States* v. *Calandra, supra,* at 343-344; *Branzburg* v. *Hayes,* 408 U.S. 665, 700 (1972); *Costello* v. *United States,* 350 U.S. 359, 364 (1956)]. In an effort to insure that grand juries in New York are untouched by influence, so that they may be able to independently conduct thorough investigations of criminal activity, including misconduct of public officers and public servants, the New York Legislature has seen fit to disqualify those citizens who depend upon government for their livelihood.

The classification which New York Judiciary Law §598 establishes is not patently arbitrary and bears a significant rational relationship to the legitimate governmental interest involved [*Jefferson* v. *Hackney,* 406 U.S. 535, 546 (1972); *Richardson* v. *Belcher,* 404 U.S. 78, 81 (1971); *Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970); *McGowan* v. *Maryland,* 366 U.S. 420, 426 (1961)]. The rationale of the statute has been discussed and approved in lower federal courts, one of which has concluded that "rational people could surely entertain the broad underlying premises that those dependent upon government for substantial income might be unsuitably conflicted if they served as jurors" [*United States ex rel. Epton* v. *Nenna,* 318 F.Supp. 899, 904 (S.D.N.Y. 1970), *aff'd,* 446 F.2d 363 (2d Cir. 1971)] [see also *Fay* v. *New York, supra,* at 292 n 35]. The exclusion of public officers and governmental employees, based upon the possibility of conflict, "can be supported as a precaution against over timidity toward the authority supporting them" [*United States ex rel. Chestnut* v. *Crim. Ct.*



*of City of New York,* 442 F.2d 611, 619 (2d Cir. 1971)]. Thus, grand jurors closely associated to government and responsible in their employment to elected or appointed officials might not be as independent as the New York Legislature would deem necessary to perform the duty of the grand jury to investigate misconduct of public officers and other public servants.

The New York Legislature might also have foreseen the possibility that grand juries investigating criminal activity which does not involve official action might be biased in favor of the government if their members are drawn from those employed by government. Thus, it has been recognized that those "who receive their sustenance from the state, might be viewed as potentially too timid to disagree with the prosecuting attorney, an important spokesman of the state from which they receive substantial benefits" [*United States ex rel. Chestnut* v. *Crim. Ct. of City of New York, supra,* at 617] [see also *Glasser* v. *United States,* 315 U.S. 60, 86 (1942)]. This possibility would be highly undesirable in light of the grand jury's power to "check a prosecutor's decision to proceed against a defendant, * * * undertake investigations and make formal accusations on its own initiative" [*United States ex rel. Chestnut* v. *Crim. Ct. of City of New York, supra,* at 616].

The classification embodied in New York Judiciary Law §598 does not violate the requirement that the grand jury must be drawn from a fair cross-section of the community. It is clear that once the State chooses to provide the institution of the grand jury, the Constitution prohibits the systematic and purposeful exclusion of significant groups from the jury service, for the concept of an impartial jury proceeds on the assumption that it is drawn from a fair

cross-section of the community [*Taylor* v. *Louisiana,* 419 U.S. 522, 527-528, 530 (1975); *Peters* v. *Kiff,* 407 U.S. 493, 500 (1972); *Apodaca* v. *Oregon,* 406 U.S. 404, 410-411 (1972)]. But not all groups which can be labelled are encompassed within this rule. Systematic exclusions of racial groups from grand juries have long been held to be prohibited [*Peters* v. *Kiff, supra,* at 497; *Alexander* v. *Louisiana,* 405 U.S. 625 (1972); *Bush* v. *Kentucky,* 107 U.S. 110 (1883)], since Congress enacted a statute to this effect pursuant to the enabling act of the Fourteenth Amendment in 1875 [8 U.S.C. §44, presently 18 U.S.C. §243; see *Fay* v. *New York, supra,* at 282-283]. Since then, the principle has been applied "to any identifiable group in the community which may be the subject of prejudice" [*Swain* v. *Alabama,* 380 U.S. 202, 205 (1965)], as distinct ethnic groups shown to exist within a community and subject to community biases [*Castaneda* v. *Partida,* —— U.S. —— (No. 75-1552, March 23, 1977); *Hernandez* v. *Texas,* 347 U.S. 475, 477-479 (1954)], or substantial portions of the community, as daily wage earners [*Thiel* v. *Southern Pacific Co.,* 328 U.S. 217, 223 (1946)] and women [*Taylor* v. *Louisiana, supra,* at 524, 530-531, 534 (53% of eligible jurors)]. But all groups which can be categoribed and identified do not constitute identifiable groups entitled to group-based protection, as this Court observed concerning the allegedly cognizable class of "young adults" [*Hamling* v. *United States,* 418 U.S. 87, 136-137 (1974)].

The classification defined in New York Judiciary Law §598 does not constitute a significant group which is either the subject of community prejudice or a substantial portion of the community, the exclusion of which prevents grand juries from constituting a fair cross-section of the community. Public officers and government employees include persons of all races, ages, occupations, economic groups, social groups, geographic areas, religions, political viewpoints, and both sexes. Although appellants complain that the acts investigated by the grand jury, arising from public employment, required that public employees be represented in the jury pool, it is perhaps more relevant to note that the acts investigated by the grand jury arose from a labor dispute. Yet, there is no claim, nor could there be, that union members were not represented in the jury pool [see *Fay* v. *New York, supra,* at 293-294].



Finally, the intrinsic differences between grand and petit jury service justify the disqualification defined in New York Judiciary Law §598 as to grand juries alone [see *Castaneda* v. *Partida, supra* (Powell, Burger, Rehnquist, JJ., dissenting)]. The narrowly defined purpose of a petit jury to find facts presented to it in an adversary proceeding, within the framework of procedural and evidentiary rules, contrasts sharply with the autonomous character of the grand jury which operates without the aid of a judge and determines the scope of its inquiry. Reflecting these differences, the procedures available for challenging petit jurors [see NewYork Criminal Procedure Law §§270.15, 270.20] are much broader than the limited procedures available to challenge grand jurors [see New York Criminal Procedure Law §190.20(2); Practice Commentary, Richard G. Denzer, McKinney's Cons. Laws of New York, Book 11A, NYCPL §190.20, p. 104].

## III.

**New York Penal Law §§145.20, 195.05 are constitutional as applied to appellants, unaffected by the Supremacy Clause of the Constitution of the United States.**

The federal question whether New York Penal Law §§145.20, 195.05 are repugnant to the Constitution of the United States under Article VI, Clause 2, as applied to appellants, because the application of the penal statutes to appellants is preempted by federal statute, 33 U.S.C. §499, is so unsubstantial as not to need further argument.

While it is clear that "acts of State Legislatures * * * [which] interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution," [*Gibbons* v. *Ogden,* 9 Wheat. 1 (1824)] are invalid under the Supremacy Clause [see *Perez* v. *Campbell,* 402 U.S. 637, 649 (1971); *Kelly* v. *Washington,* 302 U.S. 1, 4, 8 (1937)], it is obvious that New York Penal Law §§145.20, 195.05 as they were applied to appellants in the indictments are not in direct conflict with 33 U.S.C. §499 [28 Stat. 362, c. 299 §5 (1894)]. The federal statute seeks to proscribe the wilful failure, refusal, or neglect to open draws of bridges across navigable waters, while the state penal statutes as applied proscribe tampering with bridges with intent to cause a substantial interruption and impairment of service rendered to the public and effecting that result.

Moreover, since a state can exercise police power even though interstate commerce may be affected [*Kelly* v. *Washington, supra,* at 9-10], federal law will not displace



state action unless there is a clear and manifest purpose of Congress to do so [*DeCanis* v. *Bica,* 424 U.S. 351, 47 L. Ed.2d 43, 50 (1976); *Florida Lime and Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 146 (1963)]. No such purpose by Congress to preempt state power to regulate drawbridges over navigable waters has ever been stated.

Under none of the criteria established by this Court can it be argued that Congress intended to preempt state regulation of the operation of drawbridges over navigable waters, since the federal regulation is not pervasive, the federal interest is not dominant, there is no interference with any federal program, and federal policy is not thwarted [see *DeCanis* v. *Bica, supra,* at 49, 50 n5, 53; *Kewanee Oil Co.* v. *Bicron Corp.,* 416 U.S. 470, 479 (1974); *Burbank* v. *Lockheed Air Terminal,* 411 U.S. 624, 633 (1973); *Pennsylvania* v. *Nelson,* 350 U.S. 497, 501-507 (1956); *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218, 230-231, 236 (1947); *Hines* v. *Davidowitz,* 312 U.S. 52, 62 n22, 67 (1941)].

On the contrary, the State of New York has exercised its police power to establish rules applicable on land and water within its limits. Such state regulation is certainly permissible, even though such rules incidentally affect maritime affairs, provided that the state action does not contravene any acts of Congress [*Askew* v. *American Waterways Operators,* 411 U.S. 325, 334, 337-339, 341-343 (1973); *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440, 442 (1960); *Skiriotes* v. *Florida,* 313 U.S. 69, 75 (1941)]. The New York penal statutes involved constitute the exercise of police power only incidentally affecting maritime affairs,

and are directed specifically toward a public utility operated by a municipality. These statutes do not contravene the federal statute, for the federal and state statutes are aimed at different objectives which are complementary, and create criminal penalties for acts which have very different elements.

## Conclusion

***The motion to dismiss the appeal or, in the alternative, to affirm the order and final judgment of the Court of Appeals of the State of New York, should be granted.***

Respectfully submitted,

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